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NO. 75-664

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1975

ARMIN ARTHUR SCHURMANN, *Petitioner*

Against

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. _____

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, ARMIN ARTHUR SCHURMANN, prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated September 5, 1975.

OPINION BELOW

The Court of Appeals opinion was per curiam and is unpublished. A copy of same is set out in the Appendix, infra, page 9.

JURISDICTION

The petitioner's motion for rehearing en banc was denied without opinion and a copy of the court's order

pertaining thereto is set out in the Appendix, infra, page 10.

The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Is an accused denied his right to a fair trial by refusal of the trial court to permit him to attack the credibility of a witness who gives damaging testimony against him by proof that such witness's reputation for truth and veracity is bad?

2. Is it harmless error beyond a reasonable doubt when the trial court refuses to permit an accused to attack the credibility of a witness who has given damaging testimony against him by proof that such witness's reputation for truth and veracity is bad?

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 2111:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Title 18, United States Code, § 659:

> INTERSTATE OR FOREIGN SHIPMENTS BY CARRIER — STATE PROSECUTIONS. — Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motor-truck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or

> air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .

SUMMARY OF THE FACTS OF THE CASE

The indictment is in two counts, the first alleging the theft of 82 pieces of aluminum drill pipe that occurred on or about February 7, 1974, and the second count alleging the theft of 48,131 pounds of steel angles that occurred on or about February 4, 1974, in violation of Title 18, United States Code, § 659.

The Government's witnesses proved that the items in question in each count were moving in interstate commerce when they were stolen while loaded on parked trucks in the City of Houston, Texas, on the dates alleged in the indictment. The witness, John Stanton Clarkson, testified that he was introduced to the appellant by the witness's brother-in-law, William Follis, at which time the appellant advised him that a large quantity of steel angles was stored in a warehouse and that the owner of them wanted to dispose of the steel in order to clean the warehouse. The witness Clarkson found a buyer, had the steel delivered, and received a check in payment thereof in the amount of $5,900.00, out of which he delivered $4,000.00 to the appellant and $950.00 to his brother-in-law Follis. A few days later, William Follis

again contacted the witness Clarkson and informed him that the appellant had a quantity of steel-aluminum drill pipe that was for sale and the witness Clarkson and Follis went to a warehouse and examined the steel, subsequently took pictures of it which were delivered to one Jack Corey, who stated that he could find a buyer for the pipe. A few days later the pipe was delivered by truck to the storage yard of the witness Jack Corey and the Government's witness, Chester Rogers, identified the appellant as being one of the parties who helped deliver the pipe. The witness, William Follis, testified that he had known the appellant for a number of years and that the appellant told him that there were some steel angles that were for sale and asked if he knew anybody that wanted to buy them; that they were stored in a warehouse, but that the appellant didn't know where the warehouse was. He testified that he contacted his brother-in-law Clarkson, and that the two of them went to the warehouse and examined the steel angles, which were subsequently sold by the witness Clarkson and the money divided as stated above. He further testified that a few days later, the appellant said that he thought there was some pipe in the same warehouse that was also for sale and that he and his brother-in-law Clarkson again returned to the warehouse and examined the pipe, that he was present when the pipe was delivered to the yard of the witness Corey, and that the appellant was also there.

The witness, Roger Lamb, testified that he was contacted by the appellant who took him to a certain warehouse where he noticed a truckload of aluminum pipe, and that the appellant asked him to help him unload it, which he did and, further, that the appellant promised to pay him some money for his assistance. He also testi-

fied that he suspected that the pipe was stolen, although the appellant never told him that it was. However, he stated that the appellant contacted him a few days later by telephone, and told him that the deal was off and that, "the boy got caught." The witness Lamb at first denied that he had ever been in the warehouse before the occasion when the appellant took him there to unload the pipe, but later admitted that he had arranged for the lease on the warehouse and had been there previously.

The appellant called the witness, Lane Langford, who testified that he was acquainted with the witness Lamb and had known him for twelve to fifteen years. When the appellant attempted to question the witness Langford as to his knowledge of the general reputation of the witness Lamb within the community in which he resides and among the people with whom he associates for truth and veracity, the Government objected thereto and the Court sustained the objection and refused to permit the witness to answer the question. The appellant tendered the witness's testimony to the effect that he would testify that he was knowledgeable of the witness's reputation in such capacity, and that it was bad.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The decision below conflicts with the decisions of other courts of appeals as to the propriety of impeaching a witness by proof that such witness's reputation for truth and veracity is bad.

The Court below choose not to rule directly upon the issue of whether error existed in the trial court's refusal to permit attack upon the Government's witness's credibility

by proof that his reputation for truth and veracity was bad. If, however, the Court's opinion can be interpreted as holding that the trial court's action was not error, then, it is in conflict with a long established rule of evidence as character for truth is always and everywhere admissible. *Wigmore on Evidence,* § 922. This rule has been followed in other circuits. See *U.S. v. Walker,* 313 F.2d 236, 239, 6th C.A.; *Swafford v. U.S.,* 25 F.2d 581, 584, 8th C.A.; *Sawyear v. U.S.,* 27 F.2d 569, 570, 9th C.A.; *Creekmore v. Crossno,* 259 F.2d 697, 698, 10th C.A.

These conflicts justify the grant of certiorari to review the judgment below.

2. The decision below conflicts with the applicable decisions of the Supreme Court concerning the harmfulness of the trial court's refusal to permit impeachment of a damaging Government's witness.

The Court of Appeals held that the error, if any, in disallowing the testimony as to the truth and veracity of the witness Lamb, was harmless. A review of the record will reveal that the witness Lamb's testimony was the most damaging to the appellant of all the Government's evidence. With the exception of the witness Rogers, he was the only person who placed the appellant in the presence of the stolen property. In addition, his testimony placed the appellant in possession of the property in the late hours of the night under suspicious circumstances and undoubtedly played a large part in the appellant's conviction.

As stated in *Fahy v. State of Connecticutt,* 375 U.S. 85, 85 S.Ct. 229,

> "The question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction."

And in *Chapman v. California,* 386 U.S. 18, 85 S.Ct. 824,

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived as harmless."

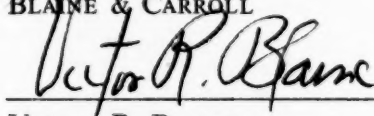
Certainly, if the admission of damaging evidence is harmful and requires reversal, the failure to admit beneficial evidence which may have possibly influenced the jury in the appellant's favor, should also not be conceived as harmless.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

BLAINE & CARROLL



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CERTIFICATE

I, VICTOR R. BLAINE, Attorney for Petitioner, hereby certify that one (1) copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Respondent's Attorney, HON. EDWARD McDONOUGH, by placing the same in the United States Mail, postage prepaid, 515 Rusk, Houston, Texas 77002, on this the 1st day of November, 1975.

Victor R. Blaine

VICTOR R. BLAINE

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2045
Summary Calendar*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

ARMIN ARTHUR SCHURMANN, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(September 5, 1975)

BEFORE WISDOM, BELL and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] We find no error in the refusal of the district court to permit an attack on the credibility of a witness by proof of a fifteen year old felony conviction. We find that the error, if any, was harmless in disallowing testimony as to truth and veracity respecting the same witness.

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

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600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

October 6, 1975

TO ALL COUNSEL OF RECORD

No. 75-2045 — U.S.A. v. SCHURMANN

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

by /s/ ANNE G. PARENT
Deputy Clerk

cc: Mr. Victor R. Blaine
Mr. Harold S. Jaquet
Mr. James R. Gough, Jr.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-664

ARMIN ARTHUR SCHURMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that reversal of his convictions is required because the trial court improperly limited his efforts to impeach the credibility of a government witness.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of theft of goods moving in interstate commerce, in violation of 18

U.S.C. 659. He was sentenced to two consecutive terms of five years' imprisonment. The court of appeals affirmed (Pet. App.).

Evidence adduced at trial established that two trucks containing goods moving in interstate commerce were stolen in Houston, Texas, in February 1974. On February 4, 1974, a truck with a cargo of angle iron was stolen from the premises of a trucking company (Tr. 57-59). Shortly after that theft, petitioner contacted William Follis and asked him to locate a buyer for the angle iron (Tr. 167-169). Follis contacted John Clarkson, a pipe broker, who met with petitioner and inspected the angle iron at a warehouse where it was stored (Tr. 67-69). Clarkson subsequently sold the angle iron to a third party for $5,900, giving petitioner $4,000 of the proceeds (Tr. 70-72).

On February 6, 1974, a truck containing aluminum drilling pipe worth approximately $50,000 was stolen from a Houston gas station where it had been parked for the night (Tr. 16, 21-26, 133). Petitioner and Roger Lamb unloaded the truck at the warehouse, and petitioner again contacted Follis in order to find a buyer for the pipe (Tr. 172, 187-190). Petitioner met with Clarkson, who arranged a sale of the pipe to a pipe supply company (Tr. 74-77, 111-112). Petitioner was present when the pipe was delivered to that company a few days later (Tr. 113, 143-144, 173).

The pipe was subsequently identified as stolen property, and arrests followed (Tr. 79, 135). A

search of the warehouse by the FBI produced several tags and a raincoat that had been on the truck containing the angle iron when it was stolen (Tr. 24-26, 252-255). The lettering on a sign found on that truck when it was recovered matched the size and design of the letters in a stencil found in a subsequent search of an automobile dealership operated by petitioner. The type of ink used in the sign also matched the ink residue found on the stencil (Tr. 247-248, 258-259, 271-273, 282-283).

Petitioner contends that his convictions must be reversed because the trial court did not permit a defense witness to testify concerning the reputation for truth and veracity of one government witness, Roger Lamb (Tr. 289-290).

As the court of appeals held, however, any error in excluding this testimony was harmless. In addition to the circumstantial evidence—including the stencil that had apparently been used to disguise one of the stolen trucks—the testimony of three government witnesses in addition to Lamb directly linked petitioner to the thefts.

The extent of Lamb's testimony was that he had helped petitioner unload the stolen aluminum pipe at the warehouse and that two days later petitioner informed him that he would not be paid because "the boy got caught." Lamb did not testify regarding the theft, the sale of the angle iron, or the disposition of the stolen pipe (Tr. 186-196).

William Follis testified that petitioner asked him after each of the thefts to find a buyer for the angle

iron and the aluminum pipe. Follis stated that he informed John Clarkson of petitioner's requests (Tr. 167-174). Clarkson testified that he met with petitioner at the warehouse to view and inspect stolen goods after each theft (Tr. 68-74, 110-112). Clarkson further testified that he arranged for the sale of the goods for petitioner and gave petitioner $4,000 from the proceeds of his sale of the angle iron (Tr. 70-77). Moreover, petitioner was identified as one of those present during the delivery of the stolen aluminum pipe to the pipe supply company, not only by Follis and Clarkson but also by the warehouseman who unloaded the pipe (Tr. 113, 143-144, 173).

In view of the overwhelming evidence of petitioner's guilt, the court of appeals properly determined that the exclusion of testimony concerning the reputation for truth and veracity of one government witness was harmless error. That determination involved only the application of settled principles to the specific facts of this case, and it does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 599164 165